Petition

81-344 No. ....
IN THE

Supreme Court of the United States

Office-Supreme Court, U.S.
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October Term, 1981

In the Matter of the Contested Election
of Ralph Hernandez for the Office of
Common Council for the City of San Bernardino

RALPH HERNANDEZ,

Petitioner,

vs.

LUTHER T. FAIR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, DISTRICT FOUR, DIVISION TWO.

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Questions Presented.

This Petition arises out of an election contest and raises the questions:

1. Whether California statutes invalidating an intentionally identifiable ballot, which statutes are intended to prevent intimidation or corruption of voters, may be enforced consistent with the Due Process Clause of the Fourteenth Amendment under the following circumstances:

(a) the voter placed her initials on the ballot in mistaken but good-faith reliance on instructions from a public official;

(b) there is no hint or suggestion of voter intimidation or corruption;

(c) nevertheless, the statutes erect an irrebuttable presumption that an intentionally identifiable ballot evidences a corruption of the election process; and

(d) the California Supreme Court has concluded that the statute's primary effect is to penalize ignorance or mistake.[1]

2. Whether a California statute may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, be enforced in a one-office election to invalidate write-in votes because the write-in candidate's name, while clearly written on the ballot, was not placed in the precise space provided under the following circumstances:

(a) the ballots evidence the plain intention of the voters;

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[1] *Patterson v. Hanley*, 136 Cal. 265, 269-270, 68 P. 821, 68 P. 975 (1902).

(b) the ballot was unnecessarily complicated and arguably was disguised to conceal the blank space provided for write-in votes[2];

(c) the effect of the statute is to discourage and disenfranchise uneducated, inexperienced minority voters; and,

(d) invalidation of these ballots is likely to be determinative of the outcome of the election.

[2]This was the view expressed by the trial judge who heard the case.

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No. ....

IN THE

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In the Matter of the Contested Election
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RALPH HERNANDEZ,

Petitioner,

vs.

LUTHER T. FAIR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, DISTRICT FOUR, DIVISION TWO.

Petitioner Ralph Hernandez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, District Four, Division Two, filed in this proceeding on March 12, 1981.

Opinions Below.

The opinion of the California Court of Appeal, District Four, Division Two, as reproduced in Appendix A hereto, is reported at 116 Cal.App.3d 868, 881, ... P.2d ...., 172 Cal.Rptr. 379. Petition for Rehearing was denied without opinion (Appendix B hereto). The California Supreme Court

denied Petition for Hearing without opinion (Bird, C.J., voting to grant) (Appendix C hereto). The Findings of Fact and Conclusions of Law of the Superior Court of San Bernardino County are set forth in Appendix D hereto.

Jurisdiction.

The judgment of the California Court of Appeal, District Four, Division Two, reversing judgment for Petitioner was filed on March 12, 1981. The Court of Appeal denied a timely Petition for Rehearing on April 2, 1981. A timely Petition for Hearing in the California Supreme Court was subsequently denied on May 20, 1981, and this Petition for Certiorari was filed within 90 days of that date.

The judgment is final for purposes of review by this Court. (See, *e.g.*, *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) [judgment final where in further proceedings in state courts later review of federal issues is unavailable, whatever the outcome; "the federal issue having been decided, arguably wrong, and being determinative of the litigation if decided the other way, the finality rule was satisfied"]; *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156 (1973); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *Construction Laborers v. Curry*, 371 U.S. 542 (1963); *Radio WOW v. Johnson*, 326 U.S. 120 (1945); generally see, Stern and Gressman, *Supreme Court Practice* (5th ed. (1978) p. 183 *et seq.*)

On August 13, 1981, the Superior Court of San Bernardino County granted a temporary stay of further proceedings pending review by this Court on certiorari (Appendix E hereto).

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).[3]

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[3]Since this petition draws into question the constitutionality of California Elections Code sections 14238, 14241, and 17007, 28 U.S.C. section 2403(b) may be applicable.

Statutory and Constitutional Provisions Involved.

1. California Elections Code:

Section 14238 (in relevant part):	"A vote for a candidate or person whose name is not printed on the ballot may be cast by writing in a name for that office in the blank space left for that purpose."
Section 14241:	"No voter shall place any mark upon a ballot that will make that ballot identifiable."
Section 17007 (in relevant part):	"Any ballot which . . . is marked or signed by the voter so that it can be identified by others shall be rejected."

2. United States Constitution:

Fourteenth Amendment, Section 1 (in relevant part):

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

1. Ralph Hernandez was denied a place on the regular ballot in the May, 1979 runoff election for councilman of the City of San Bernardino's largely Spanish-American Third Ward. He nevertheless qualified as a write-in candidate.

2. The official election ballot was in two parts: (a) an orange punchcard ballot, and (b) as described by the trial court, a "separate write-in ballot cleverly designed and, it could be argued, disguised as an envelope into which the

punchcard ballot would be inserted." (R.T. 546.) The envelope instructed on its exterior flap, in Spanish and English, "After voting insert ballot card with stub exposed into envelope pocket and close flap." Below this instruction was a miniature illustration depicting an *open* envelope with ballot card inserted. On this miniature illustration, the words "Write-In Ballot" appeared in small print and in English only. On the envelope's interior, under its outside flap, the words "Write-In Ballot" appeared in English and the Spanish equivalent, and below that there were several blank spaces where the candidate's name could be written in. An inexperienced voter, or one who could not read English, would have no occasion to lift the exterior flap and find the place to write the candidate's name. For a simple election involving one office and three candidates, this was a "particularly complicated ballot." (R.T. 546.)

3. Many citizens of the Third Ward did not read or write in Spanish or English, but they voted in this election for the first time despite the complexity of the ballot. (R.T. 251-252, 297-298, 407, 411, 416, 518.)

4. When all the votes were counted, including heavy absentee balloting, Ralph Hernandez was declared the winner by four votes.

5. The runner-up, Mr. Fair, demanded a recount; still it was Hernandez by three votes. A judicial challenge followed. The trial judge heard extensive evidence regarding challenged votes, and confirmed Hernandez' election on a tally of 796 to 794. (App. D.)

6. Mr. Fair appealed his election, challenging, as far as pertinent here, five votes. Two years into the term to which Petitioner was elected, the California Court of Appeal, District Four, Division Two, ruled with respect to these critical votes:

a. The vote of Angela Alvarado was void. In completing her absentee ballot, Ms. Alvarado inadvertently wrote her own name where she intended to write that of Ralph Hernandez. She called the County Registrar's Office and was told to scratch out her name, initial the scratch-out, and fill in the name of her candidate. She did so. (C.T. 229.) The Court of Appeal voided this ballot under California Elections Code sections 14241 and 17007 because it had been intentionally made "identifiable." Thus, a conscientious elector, intent on casting her write-in vote and relying in good faith upon official advice on how to do so, saw her vote invalidated under a statute which the State Supreme Court in 1902 said was designed to prevent corruption of the electoral process, but which it acknowledged only had the effect of invalidating votes on the basis of ignorance and mistake. Now, almost 80 years later, the State Supreme Court's analysis has been reconfirmed in the case of Ms. Alvarado.

b. Four other write-in votes were voided. These four votes had Ralph Hernandez' name written on the orange ballot punchcard. Notwithstanding that the intention of these four voters was clear, and without regard to the character of the election or the electorate, the Court of Appeal construed California Elections Code section 14238 for the first time to mandate that a write-in vote appear only in the "blank space provided" on the inside flap of the envelope, making a write-in elsewhere on the ballot invalid. Thus, those persons too uneducated or inexperienced in voting to pierce the confusing design of the ballot and find their way to the blank space under the flap of the envelope saw their votes cast for nought.

7. At the first opportunity, in his Petition for Rehearing (Appendix F hereto), Petitioner objected that, under the Court of Appeal's construction and application of these statutes, there was no compelling state interest justifying this

severe infringement of the fundamental right to vote, and that these statutes, as applied, were arbitrary and irrational and denied the equal protection of the laws, all in violation of the Fourteenth Amendment of the United States Constitution. The Court of Appeal denied Petition for Rehearing, and the California Supreme Court denied review.

8. While the case was remanded to the trial court for further proceedings, such proceedings (which would be unnecessary were these constitutional issues resolved in favor of Petitioner) will not restore the votes of the five disenfranchised voters, and are unrelated to the federal constitutional issues raised herein. The Superior Court of San Bernardino County has stayed such proceedings pending this Court's consideration of this petition.

REASONS FOR GRANTING REVIEW.

INTRODUCTION.

In an election involving an unusually heavy use of absentee ballots and a significant turnout of persons who had never voted before, the largely Spanish-American electorate of the City of San Bernardino's Third Ward succeeded in electing their write-in candidate, Ralph Hernandez. In order to do so it was necessary for them to overcome not only language and educational impediments, not only the unnecessary complexity of the ballot employed for a simple, one-office election, but also the skepticism common among the electorate about the efficacy of the ballot — a skepticism perhaps more pervasive among minority voters. These voters were entitled to believe that the Voting Rights Act of 1965 and other legislative reforms, as well as this Court's consistent vindication of the fundamental nature of the right to vote, assured them an actual and not a mere theoretical opportunity to participate in the machinery of democracy. The judgment presented for review shatters any such belief.

The statutes at issues in this case are not as undisguisedly discriminatory as a literacy test. But they discriminate equally effectively by penalizing lack of experience and unfamiliarity with voting procedures. They may not directly prevent the exercise of the franchise; but they work more cruelly by permitting the exercise of voting while negating its purpose and effect. The disillusioning and alienating effect must be the same as that caused by direct disenfranchisement.

The invalidation of the five votes in this case is, of course, a grievous personal loss to the individual electors whose votes were rendered meaningless. And naturally, Petitioner is sorely aggrieved by the loss of these critical votes, as are

all of the people who voted for him.[4] But the case is not brought before this Court merely because of its effect on a handful of California voters, nor simply because of its effect on a city council race. Rather, the case involves the fundamental integrity and fairness of California's electoral system. " 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.' " (*Williams v. Rhodes*, 393 U.S. 23, 31 (1968).)

I.

THE TWO CALIFORNIA STATUTES INVALIDATING AN IDENTIFIABLE BALLOT DO NOT RATIONALLY SERVE ANY STATE INTEREST. MOREOVER, THEY CREATE AN UNCONSTITUTIONAL IRREBUTTABLE PRESUMPTION THAT AN IDENTIFIABLE BALLOT EVIDENCES A CORRUPTION OF THE ELECTORAL PROCESS. THEIR SOLE EFFECT IS TO DISENFRANCHISE ON THE BASIS OF IGNORANCE AND INNOCENT MISTAKE.

The Court of Appeal held California Elections Code sections 14241 and 17007 invalidate the vote of Angela Alvarado because her ballot was intentionally rendered identifiable when she initialed a mistake on her absentee ballot pursuant to instructions from the Registrar's Office. This result is more than "unfortunate" (App. A, p. 7), it is patently unconstitutional.

The purpose of such statutes has long been recognized in California:

> "It has been held by this court, and by many other courts, as is indeed evident, that the whole design of

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[4]Even the one vote of Angela Alvarado by itself could have a critical impact on the outcome of the election since, on remand to the trial court, other ballots might be invalidated.

> the statute,[5] in this aspect, is to prevent the intimidation or corruption of electors by defeating its object. It is assumed that there can be no effective bribery or intimidation in the absence of any means of determining whether the elector has voted according to his promise, and that if any mark or indication which will serve to identify the ballot cast by a particular person will at the same time insure its rejection, there will no longer exist any motive for attempting to influence him by threats or promises." (*Patterson v. Hanley, supra,* 136 Cal. 265, 269.)

But it has been recognized for just as long that such statutes do not rationally further this objective. As observed in *Patterson and Jennings v. Brown,* 114 Cal. 307, 309, 46 P. 77 (1896), a person intent on making his ballot identifiable for corrupt purposes may do so in any number of ways without destroying the legality of the ballot. The statutes at issue in this case do not strike at malefactors; indeed, in *Patterson,* they were described as impotent to do so. These statutes strike virtually entirely at the innocent. Nevertheless, the California courts, including the Court of Appeal in the instant case, continue to enforce the statutes despite "the conviction often forced upon [them] that the marks which have the effect of invalidating ballots are in most instances [as in this case] the result of ignorance and mistake, and not of any plan for the corruption or intimidation of voters." (*Patterson v. Hanley, supra,* 136 Cal. 265, 269-270.) In other words, the statutes are not merely over and under-inclusive, they simply are not rationally related to furthering their avowed purpose. No democratic system can permit laws so frankly irrational to disenfran-

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[5]Political Code section 1215, a predecessor of Elections Code section 14241, provided: "No voter shall place any mark upon his ballot by which it may be afterward identified as the one voted by him."

chise voters like Angela Alvarado, who conscientiously do everything in their power to cast an effective ballot.

The same conclusion may be reached by viewing these statutes in terms of their irrebuttable presumption that a ballot made intentionally identifiable is done so for a corrupt reason, *i.e.*, to afford evidence of submission to bribery or intimidation. Where, as in this instance, "the private interests affected are very important, and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure," the Constitution "requires the Government to act on an individual basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices." (*U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508, 518 (1973), Marshall, J., concurring; *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).)

The reasons Angela Alvarado's ballot was identifiable were fully explored by the trial court. There was no hint of a corrupt purpose, only a mistake followed by good faith reliance on advice given by the Registrar's Office, presumably in good faith. As the California Supreme Court indicated in *Patterson*, a similar innocence of corruption would appear in most cases of identifiable ballots.

Petitioner respectfully submits that the presumption created by California Elections Code sections 14241 and 17007 cannot, consistent with due process dictates of the United States Constitution, be irrebuttable. T[illegible], under either a rational relationship or an irrebuttable presumption analysis, the California statutes invalidating an "identifiable" ballot may not constitutionally effect a forfeiture of the fundamental right to vote.

II.

AS CONSTRUED AND APPLIED BY THE COURT OF APPEAL, CALIFORNIA ELECTIONS CODE SECTION 14238 EFFECTS AN ARBITRARY AND INVIDIOUSLY DISCRIMINATORY DENIAL OF VOTING RIGHTS.

The right to vote may be as effectively deprived by procedural snare as by substantive exclusion. For this reason, "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote." (*Moore v. Ogilvie*, 394 U.S. 814, 818 (1969).) Few procedures play as central a role in the election process as the ballot itself.

Since the right to vote is fundamental, a state-established procedure imposing a real and appreciable impact on this right must pass strict scrutiny to discern whether it is justified by a compelling state interest furthered in the least burdensome manner. (See *Bullock v. Carter*, 405 U.S. 134, 143-144 (1972).)[6] Put to this test, Elections Code section 14238 as construed and applied by the Court of Appeal simply fails; it may not be applied consistently with the Constitution to disenfranchise the voters who wrote in the name of their candidate on a part of the official ballot other than *the* blank space provided.

As the present case so clearly illustrates, voters who wrote in the name of their candidate in the "wrong" place are likely to be new voters, less well-educated, non-English-speaking, possibly illiterate. Experienced, educated, English-speaking voters are less likely to be misled by even an overly-complex ballot. Plainly the state has no legitimate interest in distinguishing between experienced

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[6]While strict scrutiny is the appropriate standard, as we illustrate, the statute does not survive even a more restrained review.

and inexperienced voters, or between English-speaking and non-English-speaking persons, or between educated and uneducated electors. Yet, these are the distinctions which inevitably exist between those whose write-in votes were in the blank space on the interior of the ballot envelope (the "right" place) and those whose votes were written on the ballot card (the "wrong" place).

The opinion of the Court of Appeal suggests an abstract, though not compelling, reason for the statute's harsh result, observing that the state's interest lies in protecting the "secrecy, uniformity and fairness of the vote." (App. A, p. 5.) But secrecy of the vote is not undermined by write-in votes written other than in *a* particular blank space. Further, the secrecy of the vote is for the protection of the voters (see *Patterson v. Hanley, supra*, 136 Cal. 265, 269); it cannot rationally be invoked to justify forfeiture of their votes. Similarly, fairness of the vote militates directly against the distinction created by the Court of Appeal; plainly it is fairest to count any clear vote, wherever it appears on the ballot, and not to discriminate against those whose educational and language limitations prevented them from mastering the intricate ballot procedure.

Uniformity of the vote, presumably for purposes of administrative convenience, appears to be the state's only possible interest in distinguishing between write-in votes on one portion of the ballot rather than another, *i.e.*, the votes may be easier to count if uniformly cast. Even this explanation, however, does not survive analysis.[7] The ballot cards, even if designed for computer count, must be manually removed from the ballot box, separated from the ballot

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[7]That the state has no overriding interest in uniformity in municipal elections is shown by California Elections Code section 22601, leaving it to the City of San Bernardino and other charter cities to adopt procedures other than as determined by the Legislature.

envelope, and numbered for cross-reference. (Cal. Elec. Code §15242.) This means they are as much subject to visual inspection and manual count for write-in votes as the ballot envelopes. Certainly there is no suggestion in this case that it was any less convenient to tally the disputed write-ins than if they had appeared on the ballot envelope. Moreover, whatever the case may have been had these write-in votes been overlooked, the fact is they were not. It is no justification for not *counting* them that, in some hypothetical circumstance, they might not have been discovered.

Moreover, even if the state's convenience may be served by furthering uniformity of the vote, it falls far short of being a compelling state interest. "[N]umerous cases have refused to permit the state to justify discriminatory legislation on the basis of similar 'administrative efficiency' interest." (*Gould v. Grubb*, 14 Cal.3d 661, 675, 536 P.2d 337, 122 Cal.Rptr. 377 (1975); *Dunn v. Blumstein*, 405 U.S. 330, 349-352 (1972); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) ["States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State"].) Further, it is plain that if the state has a compelling interest in strict uniformity of the vote, it would by no means be necessary to further it at the cost of the votes in this case. Obviously, a simpler ballot is the most likely means of achieving uniformity. It is unconscionable to present the electorate with a "particularly complicated ballot for such a simple election," confusingly involving two parts, including "a separate write-in ballot cleverly designed and, it could be argued, disguised as an envelope" (R.T. 546), and then to invoke administrative convenience to disqualify the votes of those who were led astray.

With experience and voter education, presumably the persons whose votes were nullified in this case, and other

inexperienced, uneducated or minority voters, will learn to find their way through even an unnecessarily complicated ballot to *the* blank space, wherever it may be located. But that experience and education is unlikely to occur and will certainly be unnecessarily and unacceptably delayed if the newly-enfranchised are taught now that behind the fine words and the grand invitation to participatory democracy lies an arcane procedure which by thoughtlessness or design voids their votes and installs in office a person who represents, not the majority of voters, but only the majority of those previously initiated into a mysterious election ritual.

Conclusion.

The exercise of the right to vote is one of the most precious of democratic freedoms and the best guarantee of preserving a democratic system of government. As De Tocqueville observed, the habits of freedom may be more difficult to conquer than the love of freedom itself. Invalidation of the ballots cast in the present case can only intensify the cynicism of minority voters and others not fully a part of the democratic system. These are the very voters in whom the habits of freedom should be nurtured, not only for their sake but for the sake of all of us.

For the reasons set forth, Petitioner respectfully submits that a writ of certiorari should issue as prayed and the judgment of the California Court of Appeal herein be reversed.

Respectfully submitted,

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APPENDIX A.

Opinion.

Court of Appeal, Fourth District, Division Two, State of California.

In Re Contested Election of Ralph Hernandez.

Luther T. Fair, Plaintiff and Appellant, v. Ralph Hernandez, Defendant and Respondent. 4 Civil 21889. (Super. Ct. No. 190338).

Filed: March 12, 1981.

APPEAL from a judgment of the Superior Court of San Bernardino County. Patrick J. Morris, Judge. Judgment reversed.

Allard, Shelton & O'Connor and Gary C. Wunderlin for Plaintiff and Appellant.

Garza, Kassel & Jordan, Florentino Garza and Edward F. Taylor for Defendant and Respondent.

This controversy arises out of a contested election for Councilman of the Third Ward of the Common Council of the City of San Bernardino. Appellant Fair was one of the two candidates whose name was printed on the ballot in the May 1, 1979, runoff. Respondent Hernandez was a legally qualified write-in candidate for the same seat. Following the election the City Council of San Bernardino declared Hernandez the winner over Fair by four votes. Fair requested and obtained a recount, the result of which was to reduce the margin by one, 793 votes for Hernandez, 790 votes for Fair. Fair filed an election contest. By stipulation the Registrar of Voters of San Bernardino County was appointed a special master to assist the court in a recount of the votes. The special master determined that Hernandez received 756 uncontested votes, Fair received 773 uncontested votes and that 76 votes were contested. Extensive evidence was en-

tertained by the trial court on all contested ballots. The court determined that Hernandez received 796 votes and Fair 794 votes. It made Findings of Fact and Conclusions of Law and caused judgment to be entered confirming Hernandez's election. Fair appeals from that judgment, questioning in his appeal 36 ballots which, if ruled upon in his favor, could affect the outcome of the election.

The scope of review in an election contest is not different from other cases. Where the evidence is in conflict, this court will defer to the trial court where events at trial and demeanor of the witnesses play an important part in the decision. However, the interpretation of ballots is governed by the same rules applied to the construction of all other written instruments unless the interpretation turns on the credibility of extrinsic evidence. Accordingly, this court is not bound by an interpretation given a ballot based solely on the ballot without the aid of evidence, where there is no conflict in the evidence, or an interpretation has been made upon incompetent evidence. (*Keane v. Smith* (1971) 4 Cal.3d 932, 939.)

Fair first objects to a group of four ballots, Exhibits 67A through 67H. It is not clear from the record whether or not evidence was received touching these four ballots. In any case, there can be no conflict regarding their condition. The ballot used in the contested election consisted of a numbered punchcard which provided 235 voting positions plus a separate folded envelope, used to conceal the punchcard when inserted, on the inside of which was printed the write-in ballot. Although characterized by the trial court as "particularly complicated . . . for such a simple election" the write-in ballot used conformed with the requirements of

California Elections Code section 10331.[1] In addition to the legend, "After voting insert ballot card with stub exposed into envelope pocket *and close flap*," on each a picture of the envelope *with the flap open* was graphically depicted. (Emphasis added.) With the flap open the write-in ballot, with instructions in English and Spanish, was unavoidable. No space for write-in candidates was provided on any of the numbered punchcard ballots. On three of the punchcard ballots the name "Ralph Hernandez" was written some place on the front. The same name was written on the back of the fourth punchcard ballot. None of the four write-in ballots had any candidate's name written on them.

In each of these four instances the will of the voters was evident and the trial court so found. (Findings 36-39.) But it is not enough to find out generally the voter's will, such will must be expressed in the manner prescribed by law. (*McFarland v. Spengler* (1926) 199 Cal. 147, 152.) Section 14238 states, in part: "A vote for a candidate or person whose name is not printed on the ballot may be cast by writing in a name for that office in the blank space left for that purpose." Hernandez successfully urged on the trial court that the use of the permissive "may" does not preclude counting the votes cast for him on these four ballots.

"[T]he right to express one's choice of a candidate at the polls is not unrestricted. It is subject to reasonable regulation in the interest of secrecy and uniformity of the ballot and the fairness of the vote, etc. [Citation omitted.]" (*McFarland v. Spengler, supra,* 199 Cal. 147, 152.) The Legislature has the power to establish reasonable regulations governing write-in procedures. (*Binns v. Hite* (1964) 61 Cal.2d 107, 111.) The courts have the duty to enforce the

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[1]All references are to the California Elections Code unless otherwise indicated.

statutory scheme for the conduct of the elections according to their terms and evident intention. (*Patterson v. Hanley* (1902) 136 Cal. 265, 270.) "[T]he legislative intent underlying a statute must be ascertained from its language; if the language is clear there can be no room for interpretation, and effect must be given to the plain meaning of the language. [Citations omitted.]" (*Livingston v. Heydon* (1972) 27 Cal.App.3d 672, 677.)

Recitation of the pertinent code sections compels the conclusion that the trial court erred in counting the four votes in Exhibits 67A through 67H for candidate Hernandez. Whenever ballots are to be counted by use of the machines or tabulating devices, as all but the write-in votes were in this case, ". . . write-in votes for candidates, to be counted, shall be marked . . . in the space provided opposite the names of the write-in candidates." (§ 10325.) The punchcard used in this contested election was permissible and constituted part of "the ballot" contemplated in section 10330. (§§ 10331, 10332.) The ballot is required to "contain proper blank spaces to allow the voter to write in names not printed on the ballot unless a separate write-in ballot is used. The separate write-in ballot may be . . . the envelope used to enclose a ballot card. . . . The separate write-in ballot shall provide a blank space . . . for purposes of facilitating write-in votes for offices for which write-in votes may be cast. . . ." (§ 10331.) "Space shall be provided on the ballot or on a separate write-in ballot to permit voters to write in names not printed on the ballot. . . ." (§ 10335.) "A vote for a candidate or person whose name is not printed on the ballot, may be cast by writing in a name for that office in the blank space left for that purpose." (§ 14238.) Finally, whether the vote count is in the precinct or is canvassed, "[a]ny ballot which is not marked as provided by law . . . shall be rejected" but "[a]ny name written upon

a ballot . . . shall be counted . . . if it is written in the blank space therefor. . . ." (§§ 17007, 17100.) See also section 15242, which states, in part, "[i]f a separate write-in ballot is used, the board shall number each write-in ballot which contains a write-in vote . . . and the same number shall be placed on the ballot card. . . . Before any such vote is counted the board shall . . . ascertain whether the write-in vote is valid, and count it only if it is found to be valid."

" 'Shall' is mandatory and 'may' is permissive" unless the provision or the context otherwise requires. (§§ 11, 4; *Garrison v. Rourke* (1948) 32 Cal.2d 430, 437.) If, as the court below was convinced, the direction contained in section 14238 is merely permissive the Legislature's general scheme regarding write-in votes evident in the Elections Code would be abrogated. In this election only the write-in ballot referred to was provided. If the elector was not bound by the provisions of section 14238, write-in votes might be cast in as many different ways as there were write-in voters. Such unfettered variety would undermine the secrecy, uniformity and fairness of the vote (*McFarland v. Spengler, supra,* 199 Cal. 147, 152) to say nothing of the integrity of the voting process itself.

These four write-in ballots were totally blank; no name had been written in any of the blank spaces provided. Candidate Hernandez's name was written on the punchcards which were intended to be counted by electric or mechanical means. No slot was punched opposite the name of the write-in candidate on the punchcard and, in fact, none could be because the punchcards were not the write-in ballot and there was no space provided for a write-in candidate and no numbered slot was assigned to write-in candidates. The deviation from the satutory scheme is here so considerable that the ballots cannot be saved. These four votes should

have been rejected and they must be deducted from those counted for Hernandez, reducing his total to 792.

Exhibits 75A through F are three ballots on which Hernandez's name was written on the ballot punchcard in addition to being correctly filled in on the write-in ballot. Fair claims the writings on the punchcards are impermissible identifying marks which invalidate the ballots. The line of cases which put aside some marks as not showing the necessary intent to identify turned on then extant section 7054, or its predecessor, which provided that no unauthorized mark shall invalidate the ballot unless " 'it shall appear that such mark was placed thereon by the voter for the purpose of identifying such ballot." (*Turner v. Wilson* (1915) 171 Cal. 600, 603; *Sweetser v. Pacheco* (1916) 172 Cal. 137, 139; *Garrison v. Rourke, supra,* 32 Cal.2d 430, 439; *Hawkins v. Sanguinetti* (1950) 98 Cal.App.2d 278, 280.)

The just quoted portion of the statute survived the 1961 reenactment in section 17074 (Stats. 1961, ch. 3, p. 808); however, those words are omitted in the 1975 amendments. The Legislature now mandates, "[n]o voter shall place any mark upon a ballot that will make that ballot identifiable." (§ 14241.) Because the act of voting itself makes the ballot identifiable the intent of the Legislature must have been that votes cast for the same candidate be done in so similar a manner that the ballots properly cast will be indistinguishable one from the other and therefore not be identifiable as having been cast by a particular voter. Furthermore, "[a]ny ballot which . . . is marked . . . by the voter so that it can be identified by others" is not to be counted. (§ 17007.) Although the critical words in section 17007 are different from those in section 17074 and its predecessors, their import is the same and the reasoning in the *Turner* case, requiring intent to identify, remains valid. We find on none of these three ballots anything warranting the inference that

the writing of the write-in candidate's name on the punch-card was done by the voter for the purpose of identifying the ballot. (*Turner v. Wilson, supra,* 171 Cal. 600, 604.) The trial court so found and properly counted these three votes for Hernandez.

Exhibit 78, an absentee vote cast for Hernandez, is different. Angela Alvarado inadvertently wrote her own name in the space for write-in candidates on her absentee ballot. She contacted the Registrar's Office by telephone for advice. She was told to scratch out her name, initial the scratch marks and then to vote for the candidate of her choice, which she did. As a result, arguably, the ballot was twice made identifiable. First, when the voter inadvertently wrote her name in the write-in space which we do not have to decide, and second, when, on the advice of the Registrar's Office, she placed her initials at the scratch marks. The latter was clearly intended to identify who had scratched out what had previously been written. The second marking, at least, is irreconcilably at odds with both sections 14241 and 17007. Neither the registrar nor the court has authority to change the law. It is most unfortunate that the voter is deprived of her franchise through the fault of an official but no exception exists to cover the circumstance. (*Patterson v. Hanley, supra,* 136 Cal. 265, 276.) This vote must be deducted from Hernandez's total, reducing it to 791.

In each of the remaining instances the trial court ruled correctly. We deal with them in the order raised.

After considerable evidence, the court determined that: (1) The absentee vote of Augustine Mayoral (Exhibit 7) was cast with the assistance of the voter's wife in the privacy of their common home, and only in the presence of each other, when the voter was partially physically disabled.

And (2) that the absentee vote of Molly Lizarde (Exhibit 86) was filled out by Irene Lizarde at the specific request and authorization of the voter, in the privacy of their common home, and only in the presence of each other when the voter was partially physically disabled.

Implicitly, the court found that sections 14234, 14235 and 14236 do not apply to absentee votes not cast at the polling place. We agree. Furthermore, where the evidence is in conflict this court will not disturb the findings of the trial court where, as here, they are supported by substantial evidence. (*Keane v. Smith, supra,* 4 Cal.3d 932, 939.)

The actual ballot had already been separated from the Estrada absentee ballot material (Exhibit 6) when the vote was challenged. The court found that the voter had not signed the Application For Absent Voter's Ballot or the Identification and Return Envelope but properly refused to deduct the vote from Hernandez. Even in the face of an established illegality when the manner in which the vote was cast is not certain, as here, the court is justified in refusing to deduct it. (*Hawkins v. Sanguinetti, supra,* 98 Cal.App.2d 278, 282.)

Twenty write-in ballots (Exhibits 77A through 77M) had "Hernandez" or some embellishment thereof which included the name "Hernandez" written in a proper place on the write-in ballot and were counted by the trial court. Fair's argument that the use of the surname only invalidates the ballot is without merit. The intent of the voter must first be ascertained from the ballot and where that intention is clearly expressed and the name is that of a qualified write-in candidate, inaccuracies or use of an incomplete name are of no consequence. (*Fitzsimmons v. Wilks* (1914) 25 Cal.App. 56, 58; *Muir v. Steinberg* (1961) 197 Cal.App.2d 264, 271.)

Fair complains that he was erroneously deprived of the five votes represented by Exhibits 65A, 65B, 65D, 66A, and 66B. Fair's number designation on the punchcard was 4. The first three of these exhibits have the number 24 punched. Numbers 23 and 24 are immediately to the right of number 4 on the punchcard. The last two exhibits have the number 1 punched. Neither the argument that Fair's name appeared first on the ballot and punching number 1 shows an intention to vote for him, nor the argument that number 24, being to the right and slightly lower, shows an intention to punch number 4 for Fair, is persuasive. Ballots are not to be counted as to offices as to which they are equivocal. (*Patterson v. Hanley, supra,* 136 Cal. 265, 272.) When the voter is required to punch out the number that corresponds to his chosen candidate and he fails to do so, or punches another number, which in the particular election is not assigned to either a candidate or an issue, he has failed to mark his ballot as required by law and the vote cannot be counted for his chosen candidate. (*Muir v. Steinberg, supra,* 197 Cal.App. 264, 270.)

Finally, Fair is correct that this court will not entertain on appeal what has not been previously raised at the trial court. (*Langley v. Head* (1904) 142 Cal. 368, 371.) Hernandez argues that Exhibit 64A, on which numbers 4 and 24 were punched, should be deducted from Fair's total. The trial court quite properly counted it. A vote in a blank space does not invalidate the ballot which will be counted in other particulars. (*Patterson v. Hanley, supra,* 136 Cal. 265, 272; *Sweetser v. Pacheco, supra,* 172 Cal. 137, 139.) The punching of an unassigned number on a punchcard ballot is not a disqualifying indentifiable mark in the absence of a showing of intent to make the ballot identifiable. (*Turner v. Wilson, supra,* 171 Cal. 600, 604.)

In controlling the order of proof, the trial court did not require Hernandez to go forward until Fair had concluded his presentation and then only if, at the conclusion, Fair had more legal votes than Hernandez. That circumstance did not arise in the trial court. As a result Hernandez has not affirmatively pursued defenses and contentions raised below, and he should have the opportunity to do so.

The judgment is reversed and the matter is remanded for further proceedings not inconsistent herewith.

CERTIFIED FOR PUBLICATION.

Goldstein, J.*

We concur:

Kaufman
Acting P.J.

McDaniel, J.

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*Assigned by the Chairperson of the Judicial Council.

I fully agree with the main opinion, but I think it appropriate to emphasize a point implicit in the opinion that might otherwise be passed over.

It is unfortunate that we are required to reach a result that has the effect of prolonging the uncertainty as to which candidate received a majority of the valid votes. However, preservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election.

CERTIFIED FOR PUBLICATION

KAUFMAN
Acting P.J.

APPENDIX B.

Court of Appeal—State of California, Fourth Appellate District, Division Two.

Luther T. Fair, Appellant, vs. Ralph Hernandez, Respondent. No. 4 Civil 21889. County No. 190338, San Bernardino County.

Filed: April 2, 1981.

THE COURT: Petition for Rehearing is DENIED.

Kaufman, J.
Acting Presiding Justice

C.C.: County Clerk, San Bernardino, 351 N. Arrowhead Ave., San Bernardino 92401; Allard, Shelton & O'Connor, 100 Pomona Mall West, 6th Floor, Pomona 91766; Garza, Kassel and Jordan, P.O. Box 1059, San Bernardino 92402

APPENDIX C.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

I have this day filed Order HEARING DENIED.

In re: 4 Civ. No. 21889 Fair vs. Hernandez.

Respectfully,
Clerk.

APPENDIX D.

Proposed Findings of Fact and Conclusions of Law.

Superior Court of the State of California, for the County of San Bernardino.

In the Matter of the Contested Election of Ralph Hernandez for the Office of Common Council for the City of San Bernardino (Third Ward), Luther T. Fair, Contestant, vs. Ralph Hernandez, Defendant. No. 190 338.

Filed: September 20, 1979.

The above entitled Contest of Election came on regularly for trial commencing June 25, 1979, before this Court, sitting without a jury. Contestant appeared by counsel GARY C. WUNDERLIN and defendant appeared by counsel EDWARD F. TAYLOR and FLORENTINO GARZA.

Evidence, both oral and documentary, was introduced on behalf of both parties, and the cause was argued and submitted for decision. The Court, having considered the evidence and heard the arguments of counsel, and being fully advised, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

On May 1, 1979, Contestant LUTHER T. FAIR and Defendant RALPH HERNANDEZ were citizens of the United States, over 21 years of age and residents of the Third Ward, City and County of San Bernardino, State of California.

II

On May 1, 1979, a General Election was held in said city to elect a councilman for the Third Ward of said City of San Bernardino. At the election Contestant and Defendant,

as well as a certain WILLIAM KATONA were opposing candidates for the office of City Councilman for said Third Ward. The names of Contestant and WILLIAM KATONA appeared in print upon the official ballots as opposing candidates for said office. Defendant was a duly qualified write-in candidate for that same said office.

III

On May 17, 1979, the City Clerk of said city, completed the official canvass of the returns of the election for said office, and declared that 2,190 votes were cast for all persons for said office of City Councilman, and out of said votes so cast, 794 were cast for Defendant and 791 were cast for Contestant, and 605 votes were cast for WILLIAM KATONA. Thereupon, said City Clerk declared Defendant to have received a plurality of the votes cast at said election for said office, declared him to be elected thereto, and directed a Certificate of Election be issued to him.

IV

On June 5, 1979, and within 30 days after the declaration of the result of the election, Contestant filed his Statement of Contest with the County Clerk. At least three days before trial, Contestant served and filed a written list of alleged illegal votes.

V

Within five days after the filing of the Statement of Contest, the County Clerk notified the Superior Court thereof, whereupon the Presiding Judge ordered a trial on said election contest to be held, commencing June 25, 1979.

VI

At the trial, a recount of the ballots was taken at the request of Contestant, in the presence of all the parties. At the conclusion of said recount, Contestant had 773 unchallenged votes and Defendant had 756 unchallenged votes.

VII

The Court directed that Contestant present all his evidence with respect to any remaining disputed ballots. In the event that at the conclusion of his case Contestant had more votes than Defendant, then Defendant was to proceed with the presentation of Defendant's case on ballots disputed by Defendant.

VIII

The Court now makes its findings with respect to each of the following disputed ballots presented during Contestant's case:

1. *Ballot Exhibit 1A* is a punch card ballot with positions No. 3 and No. 4 punched and taped over.

The Court finds no overvote and accepts the ballot as one legally cast for Contestant.

2. *Ballot Exhibit 1B* is a write-in envelope ballot with the words "overvote J. E. Sneddon 4/30/79 Lucy Martinez" written thereon. Exhibit 1B has an accompanying punch card ballot stapled to it, inadvertently marked Exhibit 1A, with positions No. 3 and No. 4 punched and taped over. The word "overvote" is written across it.

The Court finds no overvote and accepts the ballot as one legally cast for Contestant.

3. *Ballot Exhibit 1C* is a punch card ballot with position No. 4 punched. There is no accompanying write-in envelope ballot.

The Court accepts the ballot as one legally cast for Contestant.

4. *Ballot Exhibit 4A* is a certified copy of Registration Affidavit for John S. Borrego. Exhibit 4B is the accompanying Application For Absent Voter's Ballot, and Exhibit

4C is the accompanying Identification and Return Envelope for said elector.

The Court finds that the true address for said elector is 1280 Congress Street and not 1260 Congress Street as indicated on the aforementioned exhibits. The Court further finds the distinction to be that of a typographical error that did not render the ballot illegal.

5. *Ballot Exhibit 5A* is a certified copy of Registration Affidavit for Alice Arlene DeCasas. Exhibit 5B is the accompanying Application for Absent Voter's Ballot and Exhibit 5C is the Identification and Return Envelope for said elector.

The Court finds that the elector appeared in Court at Contestant's request and was not called to the stand. The Court further find that said elector signed all three documents, and accepts the ballot as one that was legally cast.

6. *Ballot Exhibit 6A* is certified copy of Registration Affidavit for Arthur W. Estrada. Exhibit 6B is the accompanying Application For Absent Voter's Ballot, and Exhibit 6C is the accompanying Identification and Return Envelope for said elector.

The Court finds that all three documents were not signed by the elector. The Court further finds that Contestant failed to carry his burden of proof that said ballot was cast for Defendant, and therefore the Court will not deduct said vote from Defendant. The Court is unable to find from the evidence for whom said vote was cast.

7. *Ballot Exhibit 7A* is a certified copy of Registration Affidavit for Augustine Mayoral. Exhibit 7B is the accompanying Application For Absent Voter's Ballot, and Exhibit 7C is the accompanying Identification and Return Envelope for said elector.

The Court finds said elector's wife (Julia Mayoral) signed the Identification and Return Envelope for said elector at the specific request and authorization of elector Augustine Mayoral, in the privacy of their common home, and only in the presence of each other, at a time when Augustine Mayoral was partially physically disabled.

The Court finds that the ballot was legally cast and allows the vote.

8. *Ballot Exhibit 8A* is a certified copy of Registration Affidavit for Julia Mayoral. Exhibit 8B is the accompanying Application For Absent Voter's Ballot, and Exhibit 8C is the accompanying Identification and Return Envelope for said elector.

The Court finds that said elector had signed her husband's (Augustine Mayoral) Identification and Return Envelope at his specific request and authorization, in the privacy of their common home, and only in the presence of each other, at a time when her husband, Augustine Mayoral, was partially physically disabled.

The Court finds that Julia Mayoral properly signed Exhibits 8A, 8B and 8C.

The Court finds that her ballot was properly cast and allows her vote.

9. *Ballot Exhibit 9A* is a certified copy of Registration Affidavit for Manuel M. Morales. Exhibit 9B is the accompanying Application For Absent Voter's Ballot, and Exhibit 9C is the accompanying Identification and Return Envelope for said elector.

The Court finds that all three documents were signed by said elector and therefore finds that the ballot was properly cast.

10. *Ballot Exhibit 10A* is a certified copy of Registration Affidavit for Carmen Ornelas. Exhibit 10B is the accom-

panying Application For Absent Voter's Ballot, and Exhibit 10C is the accompanying Identification and Return Envelope for said elector.

The Court find that the true address for said elector is 1280 Congress Street and not 1260 Congress Street as indicated on the aforementioned exhibits. The Court further finds the distinction to be that of a typographical error that did not render the ballot illegal.

11. *Ballot Exhibit 11A* is a certified copy of Registration Affidavit of Alejandro M. Ortiz. Exhibit 11B is the accompanying Application For Absent Voter's Ballot, and Exhibit 11C is the accompanying Identification and Return Envelope for said elector.

The Court finds that the signature on the Identification and Return Envelope was of a poorer quality than that appearing on his Application For Absent Voter's Ballot and the Registration Affidavit, but finds that all said documents were properly signed by elector, Alejandro M. Ortiz.

The Court finds that the ballot was legally cast and allows it.

12. *Ballot Exhibit 12A* is a certified copy of Registration Affidavit for Fernando Ignacio Navarrette. Exhibit 12B is the accompanying Application For Absent Voter's Ballot, and Exhibit 12C is the accompanying Identification and Return Envelope for said elector.

The Court finds that all three documents were signed by said elector and accepts the ballot as one legally cast.

13. *Ballot Exhibit 13A* is a certified copy of Registration Affidavit for Ana C. Panuco. Exhibit 13B is the accompanying Application For Absent Voter's Ballot, and Exhibit 13C is the accompanying Identification and Return Envelope for said elector.

By stipulation of the parties said ballot was declared illegally cast, and further, that said ballot was cast for Defendant.

The Court finds that said ballot was illegally cast for Defendant and disallows it.

14. *Ballot Exhibit 14A* is a certified copy of Registration Affidavit for Antonio F. Panuco. Exhibit 14B is the accompanying Application For Absent Voter's Ballot, and Exhibit 14C is the accompanying Identification and Return Envelope for said elector.

By stipulation of the parties said ballot was declared illegally cast, and further, that said ballot was cast for Defendant.

The Court finds that said ballot was illegally cast for Defendant and disallows it.

15. *Ballot Exhibit 15A* is a certified copy of Registration Affidavit for Sagrario Panuco Rodriguez. Exhibit 15B is the accompanying Application For Absent Voter's Ballot, and Exhibit 15C is the accompanying Identification and Return Envelope for said elector.

By stipulation of the parties said ballot was declared illegally cast, and further, that said ballot was cast for Defendant.

The Court finds that said ballot was illegally cast for Defendant and disallows it.

16. *Ballot Exhibit 16A* is a certified copy of Registration Affidavit for Lawrence H. Ramirez. Exhibit 16B is the accompanying Application For Absent Voter's Ballot, and Exhibit 16C is the accompanying Identification and Return Envelope for said elector.

The Court finds that said elector properly signed Exhibits 16A and 16B and also properly marked his own ballot. The Court finds that said voter's wife (Yolanda Ramirez) signed

his Identification and Return Envelope at his specific request and authorization, in the privacy of their common home.

The Court finds that the ballot was legally cast.

17. *Ballot Exhibit 17A* is a certified copy of Registration Affidavit for Yolanda Ramirez. Exhibit 17B is the accompanying Application For Absent Voter's Ballot, and Exhibit 17C is the accompanying Identification and Return Envelope for said elector.

The Court finds that said elector had properly signed the Identification and Return Envelope for her husband, Lawrence Ramirez.

The Court accepts the ballot as one legally and properly cast.

18. *Ballot Exhibit 18A* is a certified copy of Registration Affidavit for Lydia Marie Villarreal. Exhibit 18B is the accompanying Application For Absent Voter's Ballot, and Exhibit 18C is the accompanying Identification and Return Envelope for said elector.

The Court finds that said elector was a resident of Precinct 11 and accepts the ballot as one legally and properly cast.

19. *Ballot Exhibit 45* is a white envelope containing twelve (12) punch card ballots; eleven (11) ballots are orange in color, and one (1) ballot is pink in color, with the word "Duplicate" printed on it. Eleven (11) of these ballots, including the pink ballot with the word "Duplicate" on it, have position No. 4 punched. One (1) has position No. 5 punched.

The Court finds that these twelve (12) absentee ballots were found by the City Clerk in her office safe on May 4, 1979, three days following the election. The Court further finds that all twelve (12) ballots had been timely received by the City Clerk, and that eleven (11) of the twelve (12) absentee ballots were cast for Contestant, one (1) for KA-

TONA, and the Court accepts the twelve (12) ballots as being properly cast.

20. *Ballot Exhibit 61* is a white envelope from the Office of the Registrar of Voters which contains Exhibit 61A. Exhibit 61A is a punch card ballot, which at the time of the Court's review had the No. 4 position partially punched through, described as a hanging chad. It was initially not allowed by the canvassing Board.

The Court accepts the ballot as one properly cast for Contestant.

21. *Ballot Exhibit 62* is a white envelope from the Office of the Registrar of Voters containing Exhibits 62A and 62B. Exhibit 62A is a pink duplicate punch card ballot with position No. 4 punched. Exhibit 62B is a punch card ballot with position No. 4 partially indented, but not broken through, and not characterized as a hanging chad. It was originally disallowed by the canvassing board.

The Court accepts the ballot as one properly cast for Contestant.

22. *Ballot Exhibit 63* is a white envelope from the Office of the Registrar of Voters containing Exhibit 63B. Exhibit 63B is a punch card ballot with position No. 4 punched and torn at the top.

The Court accepts the ballot as one properly cast for Contestant.

23. *Ballot Exhibit 64A* is a punch card ballot with position No. 4 and position No. 24 punched and unaccompanied by a write-in ballot.

The Court finds that there was no overvote and accepts the ballot as one properly cast for Contestant.

24. *Ballot Exhibit 64B* is a punch card ballot with position No. 4 and position No. 24 punched.

The Court finds that there is no overvote and accepts the ballot as one properly cast for Contestant.

25. *Ballot Exhibit 64C* is a punch card ballot with position No. 4 and position No. 220 punched.

The Court finds that there was no overvote and accepts the ballot as one properly cast for Contestant.

26. *Ballot Exhibit 64E* is a white envelope from the Office of the City Clerk containing Exhibits 64F and 64G. Exhibit 64F is a punch card ballot partially torn at the top with position No. 4 punched. Exhibit 64G is a pink colored punch card ballot with the word "Duplicate" printed across it, with position No. 4 punched.

The Court accepts the ballot as one legally cast for Contestant.

27. *Ballot Exhibit 64H* is a write-in envelope ballot with the words "City Councilman Third Ward Ralph Hernandez" written on it. Exhibit 64I is the accompanying punch card ballot with position No. 3 punched and taped over.

The Court finds that this is not an overvote and accepts the ballot as one legally cast for Defendant.

28. *Ballot Exhibit 64J* is a write-in envelope ballot with the name "Raft Hanadise" written in pencil thereon. The word "overvote" is written below the name. Exhibit 64K is the accompanying punch card ballot with position No. 4 punched and taped over.

The Court finds an overvote and does not accept the ballot as one properly cast.

29. *Ballot Exhibit 65A* is a punch card ballot with position No. 25 punched.

The Court finds it is impossible to determine for whom the vote was cast and thus disallows it.

30. *Ballot Exhibit 65B* is a punch card ballot with position No. 24 punched and taped over.

The Court finds it is impossible to determine for whom the vote was cast and thus disallows it.

31. *Ballot Exhibit 65C* is a punch card ballot with position No. 24 punched.

The Court finds it is impossible to determine for whom the vote was cast and thus disallows it.

32. *Ballot Exhibit 65D* is a punch card ballot with position No. 24 punched.

The Court finds it is impossible to determine for whom the vote was cast and thus disallows it.

33. *Ballot Exhibit 65E* is a punch card ballot with position No. 24 punched.

The Court finds it is impossible to determine for whom the vote was cast and thus disallows it.

34. *Ballot Exhibit 66A* is a punch card ballot with position No. 1 punched.

The Court finds it is impossible to determine for whom the vote was cast and thus disallows it.

35. *Ballot Exhibit 66B* is a punch card ballot with position No. 1 punched and taped over.

The Court finds it is impossible to determine for whom the vote was cast and thus disallows it.

36. *Ballot Exhibit 67A* is a write-in envelope ballot without a name written thereon. Exhibit 67B is the accompanying punch card ballot with the name "Ralph Hernandez" written at the top.

The Court finds that the true will of the elector was clearly manifested and accepts the vote as one legally and properly cast for Defendant.

37. *Ballot Exhibit 67C* is a write-in envelope ballot without a name written thereon. Exhibit 67D is a punch card ballot with the name "Ralph Hernandez" written thereon.

The Court finds that the true will of the elector was clearly manifested and accepts the vote as one legally and properly cast for Defendant.

38. *Ballot Exhibit 67E* is a write-in envelope ballot without a name written thereon. Exhibit 67F is the accompanying punch card ballot with the name "Ralph Hernandez" written thereon.

The Court finds that the true will of the elector was clearly manifested and accepts the vote as one legally and properly cast for Defendant.

39. *Ballot Exhibit 67G* is a write-in envelope ballot without a name written thereon. Exhibit 67H is the accompanying punch card ballot with the name "Ralph Hernandez" written at the top of the back side.

The Court finds that the true will of the elector was clearly manifested and accepts the vote as one legally and properly cast for Defendant.

40. *Ballot Exhibit 68* is a write-in envelope ballot with the name "Ralph Garcia" written thereon.

The Court finds it is unable to determine the true will of the elector and disallows it.

41. *Ballot Exhibit 69A* is a write-in envelope ballot with the name "John Hernandez" written thereon. Exhibit 69B is the accompanying punch card ballot with no position punched.

The Court finds it is unable to determine the true will of the elector and disallows it.

42. *Ballot Exhibit 70A* is a write-in envelope ballot with the name "Ralph" written thereon. In front of the printed

word "office" the Arabic number 3 is written. Exhibit 70B is the accompanying punch card ballot with no position punched.

The Court finds the true will of the elector cannot be determined and disallows it.

43. *Ballot Exhibit 71A* is a write-in envelope ballot with the name "Rachel Hernandez" written thereon. Exhibit 71B is the accompanying punch card ballot with no position punched.

The Court finds that it is unable to determine the true will of the elector and disallows the vote.

44. *Ballot Exhibit 72A* is a write-in envelope ballot with the name "Rafael Hernandez" written thereon. Exhibit 72B is the accompanying punch card ballot with no position punched.

The Court finds the name "Rafael" is the Spanish name for "Ralph" and further finds that the true intent of the elector was to cast his ballot for Defendant. Accordingly, the Court accepts the ballot as one properly cast for Defendant.

45. *Ballot Exhibit 73A* is a write-in envelope ballot with the name "Rafael Hernandez" written thereon. Exhibit 73B is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

46. *Ballot Exhibit 74A* is a write-in envelope ballot with the name "Ralph Fernandez" written thereon. Exhibit 74B is the accompanying punch card ballot with no position punched.

The Court finds that it is unable to determine the true will of the elector and disallows the vote.

47. *Ballot Exhibit 75A* is a write-in envelope ballot with the words "Ralph Hernandez City Council 3rd Ward" written thereon. Exhibit 75B is the accompanying punch card ballot with no position punched and with the name "Ralph Hernandez" written at the top.

The Court finds that the ballot as cast was not an identifiable ballot and accepts the ballot as one legally cast for the Defendant.

48. *Ballot Exhibit 75C* is a write-in envelope ballot with the words "Council Third Ward Ralph Hernandez" written thereon. Exhibit 75D is the accompanying punch card ballot with no position punched and with the name "Ralph Hernandez" written at the top.

The Court finds that the ballot as cast was not an identifiable ballot and accepts the ballot as one legally cast for the Defendant.

49. *Ballot Exhibit 75E* is a write-in envelope ballot with the name "Ralph Hernandez" written thereon. Exhibit 75F is the accompanying punch card ballot with no position punched. At the bottom of the ballot is written "Ralph Hernandez 236". (The figure *3* is not clear.)

The Court finds the ballot was legally cast and accepts the ballot for Defendant.

50. *Ballot Exhibit 76A* is a write-in envelope ballot with the name "Ralph Hernandez" written below the printed part of the ballot on the left-hand side. Exhibit 76B is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

51. *Ballot Exhibit 76C* is a write-in envelope ballot with the name "Ralph Hernandez" written at the top of the right-hand side of the ballot. Exhibit 76D is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

52. *Ballot Exhibit 76E* is a punch card ballot with no position punched. Exhibit 76F is the accompanying write-in envelope ballot with the name "Ralph Hernandez" written below the printed part of the ballot on the left-hand side.

The Court accepts the ballot as one legally cast for Defendant.

53. *Ballot Exhibit 77A* is a write-in envelope ballot with the name "Hernandez" written on the left-hand side. Exhibit 77B is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

54. *Ballot Exhibit 77C* is a write-in envelope ballot with the name "Hernandez" written on the left-hand side. Exhibit 77D is the accompanying punch card with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

55. *Ballot Exhibit 77E* is a write-in envelope ballot with the name "Hernandez" written on both the left and right hand sides of the envelope. Exhibit 77F is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

56. *Ballot Exhibit 77G* is a write-in envelope ballot with the words "Councilman Hernandez" written on the right-hand side of the envelope. Exhibit 77H is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

57. *Ballot Exhibit 77I* is a write-in envelope ballot with the words "Hernandez City Council 3rd Ward" written on the left-hand side of the ballot. Exhibit 77J is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

58. *Ballot Exhibit 77K* is a write-in envelope ballot with the words "Councilman Hernandez" written on the right-hand side of the ballot. Exhibit 77L is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

59. *Ballot Exhibit 77M* is a write-in envelope ballot with the words "Councilman Hernandez" written on the left side of the envelope. Exhibit 77N is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

60. *Ballot Exhibit 77O* is a write-in envelope ballot with the name "Hernandez" written on the left side. Exhibit 77P is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

61. *Ballot Exhibit 77Q* is a write-in envelope ballot with the words "Counsel Hernandez" written on the left side. Exhibit 77R is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

62. *Ballot Exhibit 77S* is a write-in envelope ballot with the words "3rd Ward Council Hernandez" written on the

left side. Exhibit 77T is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

63. *Ballot Exhibit 77U* is a write-in envelope ballot with the words "Counselman Hernandez" written on the left side of the envelope. Exhibit 77V is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

64. *Ballot Exhibit 77W* is a write-in envelope ballot with the name "Hernandez" written on the left side of the envelope. Exhibit 77X is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

65. *Ballot Exhibit 77Y* is a write-in envelope ballot with the name "Hernandez" written on the left side of the envelope. Exhibit 77Z is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

66. *Ballot Exhibit 77AA* is a write-in envelope ballot with the name "Hernandez" written on the left side of the envelope. Exhibit 77BB is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

67. *Ballot Exhibit 77CC* is a write-in envelope ballot with the words "_____ 3rd Ward Hernandez" written on the left side of the envelope. (The first word is not clear.) Exhibit 77DD is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

68. *Ballot Exhibit 77EE* is a write-in envelope ballot with the word "Hernandez" written on the left side of the envelope. Exhibit 77FF is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

69. *Ballot Exhibit 77GG* is a write-in envelope ballot with the words "City Council 3rd Ward Hernandez" written on the left side of the envelope. Exhibit 77HH is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

70. *Ballot Exhibit 77HH* (sic) is a write-in envelope ballot with the name "Hernandez" written on the left side of the envelope. Exhibit 77II is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

71. *Ballot Exhibit 77JJ* is a write-in envelope ballot with the words "3rd Ward Mr. Hernandez" written on the left side of the envelope. Exhibit 77KK is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

72. *Ballot Exhibit 77LL* is a write-in envelope ballot with the word "Hernandez" written on the left side. Exhibit 77MM is the accompanying punch card ballot with no position punched.

The Court accepts the ballot as one legally cast for Defendant.

73. *Ballot Exhibit 78A* is an Identification and Return Envelope with the name "Angela Alvarado" written thereon. Exhibit 78B is a white envelope from the Office of the City Clerk marked "Rejected Ballot". Exhibit 78C is a write-in envelope ballot with the name "Ralph Hernandez" written thereon, and below that is the name "Angela Alvarado" written in, but scratched out, with the initials "A.A." written alongside the scratched out name. Exhibit 78D is the accompanying punch card ballot with no position punched.

The Court finds that elector Angela Alvarado, through inadvertence, had originally written her name on the write-in ballot. The Court further finds that thereafter said elector contacted the San Bernardino County Registrar's Office for advice and was directed to scratch out her name and initial the scratch marks and then vote for the candidate of her choice.

The Court finds that said elector fully complied with the advice given to her and accepts her ballot as one legally cast for Defendant.

74. *Ballot Exhibit 79A* is an Application For Absent Voter's Ballot for Marie Panchere. Exhibit 79B is an unopened Identification and Return Envelope for Marie Panchere.

The parties stipulated that this ballot was not legally cast. The Court concurs and rejects said ballot.

75. *Ballot Exhibit 80A* is a write-in envelope ballot with the name "Ralph Hernandez" written thereon. To the right of the name is a star and the Arabic number 1 encircled. Exhibit 80B is the accompanying punch card ballot with no position punched.

The Court finds that said ballot is identifiable and disallows it.

76. *Ballot Exhibit 85* is the Identification and Return Envelope for Arlene Lizarde. Exhibit 85A is the Application For Absent Voter's Ballot for Arlene Lizarde. Exhibit 85B is a copy of the Affidavit of Registration of Arlene Lizarde.

The Court finds that all three documents were signed by the elector and accepts the ballot as one properly cast for Defendant.

77. *Ballot Exhibit 86* is an Identification and Return Envelope with an enclosed write-in envelope. The Identification and Return Envelope has the name "Molly Lizarde" written thereon. The enclosed write-in envelope ballot has the name "Ralph Hernandez" written thereon. Exhibit 86A is the Affidavit of Registration of Application For Absent Voter's Ballot for Molly Lizarde.

The Court finds that the names written on the Identification and Return Envelope and the write-in ballot envelope were signed by elector, Irene Lizarde, daughter of Molly Lizarde. The Court further finds the names placed on the Identification and Return Envelope and write-in ballot by Irene Lizarde were done so at the specific request and authorization of elector Molly Lizarde, in the privacy of their common home, and only in the presence of each other, at a time when elector Molly Lizarde was partially physically disabled. The Court accepts the ballot of Molly Lizarde as one legally cast for Defendant.

78. *Ballot Exhibit 87* is the Identification and Return Envelope for Carolyn Roney. Exhibit 87A is the Affidavit of Registration for Carolyn Roney. Exhibit 87B is the Application For Absent Voter's Ballot for Carolyn Roney.

The Court finds that said elector personally signed all three exhibits and accepts the ballot as one legally cast for Defendant.

79. *Ballot Exhibit 88* is the Identification and Return Envelope for Tony Gomez. Exhibit 88A is the Application for Absent Voter's Ballot for Tony Gomez. Exhibit 88B is the Affidavit of Registration for Tony Gomez, accompanied by a write-in envelope ballot with the name "Ralph Hernandez" written on the left side of the envelope, and a punch card with no position punched.

The Court finds that the documents were signed by the elector Tony Gomez and accepts the ballot as one legally cast for Defendant.

80. *Ballot Exhibit 89* is a write-in envelope ballot with the name "Ralf Hernandez" written on the left side of the envelope. Exhibit 89A is the accompanying punch card ballot with no position punched.

The Court finds that the true will of the elector can be determined and accepts the ballot as one legally cast for Defendant.

81. *Ballot Exhibit 90* is a write-in envelope ballot with the name "R. Hernandez" written on both the left and right sides of the envelope. Exhibit 90A is the accompanying punch card ballot with no position punched.

The Court finds that the true will of the elector can be determined and accepts the ballot as one legally cast for Defendant.

82. *Ballot Exhibit 91* is a write-in envelope ballot with the name "Ralph Hernandez" written on the left side of the envelope. Exhibit 91A is the accompanying punch card ballot with position No. 3 punched.

The Court finds that there is no overvote and accepts the ballot as one legally cast for Defendant.

83. *Ballot Exhibit 92* is a punch card ballot with an accompanying write-in envelope ballot and with positions No. 4 and No. 5 punched.

The Court finds an overvote and disallows the ballot.

84. *Ballot Exhibit 98* is a write-in envelope ballot with the name "Ralp Hernandez" written on the left side of the envelope. Exhibit 93A is the accompanying punch card ballot with no position punched.

The Court finds that the true will of the elector can be determined and accepts the ballot as one legally cast for Defendant.

85. *Ballot Exhibit* 94 is a write-in envelope ballot with the name "Ralph Hernandez" written on the left side of the envelope. Exhibit 94A is the accompanying punch card ballot with no position punched.

The Court finds that the ballot was not an identifiable ballot and accepts the ballot as one legally cast for Defendant.

IX

The Court finds, based upon its review of disputed votes presented by Contestant, that defendant RALPH HERNANDEZ received 796 votes and Contestant LUTHER T. FAIR received 794 votes.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

Defendant RALPH HERNANDEZ is entitled to judgment against Contestant LUTHER T. FAIR, declaring that Defendant received a plurality of the votes cast for all candidates for the Office of City Councilman, Third Ward of the City of San Bernardino, State of California, at the general

election held on May 1, 1979, and was duly elected to said office, and confirms the Certificate of Election issued to defendant RALPH HERNANDEZ.

DATED: 9-17-79.

/s/ Illegible
Judge of the Superior Court

APPENDIX E.

Order Granting Stay of Proceedings Pending Review on Certiorari.

Superior Court of the State of California, for the County of San Bernardino.

In the Matter of the Contested Election of Ralph Hernandez for the Office of Common Council for the City of San Bernardino (Third Ward), Luther T. Fair, Plaintiff, vs. Ralph Hernandez, Defendant. CASE NO. 190 338.

Filed August 13, 1981.

Defendant RALPH HERNANDEZ's motion for an order staying further proceedings pending review on certiorari came on for further hearing before me this 13th day of August, 1981; KEITH WALKER, of ALLARD, SHELTON & O'CONNOR, appearing as attorney for plaintiff LUTHER T. FAIR, and FLORENTINO GARZA, of GARZA, KASSEL, JORDAN & JURE appearing as attorney for defendant RALPH HERNANDEZ, and the Court, being fully advised in the premises, and good cause appearing therefor;

IT IS HEREBY ORDERED that all further proceedings presently pending before this Court be stayed until October 19, 1981, or until further order of this Court, to permit defendant RALPH HERNANDEZ to petition the United States Supreme Court for review on certiorari the decision of the Court of Appeal, Fourth Appellate District, Division 2, State of California (4 CIV 21889) (San Bernardino County Superior Court No. 190 338).

DATED: August 13, 1981.

PATRICK J. MORRIS
PATRICK J. MORRIS, Presiding
Judge, Superior Court
San Bernardino County
State of California

THE DOCUMENT TO WHICH THIS CERTIFICATION IS ATTACHED IS A FULL TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE. ATTEST AUG. 13, 1981.

County Clerk and Ex-Officio Clerk of the Superior Court of the State of California, in and for the County of San Bernardino.

BY BARBARA SHEPPARD, DEPUTY

[Seal]

APPENDIX F.

Petition for Rehearing.

In the Court of Appeal, Fourth Appellate District, State of California, Division Two.

In the Matter of the Contested Election of Ralph Hernandez for the Office of Common Council for the City of San Bernardino.

Luther T. Fair, Plaintiff-Appellant, vs. Ralph Hernandez, Defendant-Respondent.

"No right is more precious in a free country than that of having a voice in the election of legislators; other rights, even the most basic, are illusory if the right to vote is undermined." (*Williams v. Rhodes* (1968) 393 U.S. 23, 31.)

The Voting Rights Act of 1965 is in a significant sense the crowning achievement of the Civil Rights Movement of the 1960's. An expanded franchise, free of arbitrary restraints and furthered by bilingual voter information has been held out as the best hope for effecting social and political change, the democratic alternative to the violent upheavals witnessed in the 1960's.

The election at issue in this case is in many respects a model of the system toward which all modern voting reforms have aimed. A Spanish-American candidate for a city council seat representing a largely Spanish-speaking area was frozen out of a position as a regular candidate, so he declared as a write-in candidate. Although the Spanish-speaking voters of the Third Ward, many of whom could not read or write in either Spanish or English, were presented with a "particularly complicated ballot for such a simple election," many who had never voted before turned out to cast their votes. Against all odds, Ralph Hernandez, the Spanish-American write-in candidate, won.

Now, almost two years later, this Court has held that Mr. Hernandez has not won the right to represent the people of the Third Ward, although the desire of the plurality of the voters that he do so is undisputed. The Court reaches this result not because it must, but because of an unduly narrow reading of a series of technical statutes by which it (a) invalidates four votes because, while the votes were written on the ballot, they were not in the right space, and (b) eliminates one more vote because the ballot was, due to instructions from the Registrar's Office, "identifiable." It is ironic that the Court's opinion supports its result by citing only authorities dating from a time when there was effectively no such thing as a Spanish-American franchise in California.

The Court's opinion disenfranchises not only those persons whose votes have been thrown out, but everyone who voted for Mr. Hernandez. They have been stripped of the most precious and basic right a free country can offer. The deep disappointment and disillusionment which must follow this result, especially for Mr. Hernandez's Spanish-American constituents, should not require elaboration.

We respectfully submit that the opinion of the Court fails to give proper consideration and weight to the fundamental nature of the rights at issue or to the purpose and spirit of the laws governing elections, which require that the relevant statutes be construed "so that the real will of the electors will not be defeated by any informality or failure to comply with all of the provisions of the law." (Elec. Code §15020.) So contrued, the relevant statutes require affirmance of the judgment of the trial court. Construed in a contrary fashion, as in the Court's opinion, the statutes are constitutionally deficient. On either basis, rehearing should be granted and the judgment of the trial court, and of the people, affirmed.

GROUNDS FOR REHEARING AND LEGAL DISCUSSION

I.

THE COURT'S OPINION MISCONSTRUES RELEVANT STATUTES AND THUS FRUSTRATES THE FUNDAMENTAL PURPOSE AND SPIRIT OF THE ELECTION LAWS.

The Court's opinion correctly notes that the Legislature is free to impose reasonable regulations on the exercise of the franchise. But in considering any particular regulation, it must constantly be remembered that the regulations are designed to *assure*, not frustrate the fundamental right of free political choice. Thus, the animating spirit of the election laws requires liberal construction "so that the real will of the electors will not be defeated by any informality or failure to comply with all of the provisions of the law." (Elec. Code §15020.)[1]

The Court's opinion, by overlooking the purpose of Elections Code provisions, reaches a result which, by defeating the will of the electorate, renders the electoral process itself meaningless. The trial court found, and this Court acknowledges, that the intent of the four voters who wrote Mr. Hernandez's name on the ballot card, but not on the ballot envelope, was evident. That being so, only the clearest and most unequivocal expression of the Legislature should be taken to invalidate these votes. Three is no such expression in the Elections Code. To the contrary, not only is the Code sprinkled with provisions requiring liberal construction, but in an analogous setting the Legislature has mandated that "Any doubt in the interpretation of the law shall be resolved in favor of the challenged voter." (§14227.)

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[1]Unless otherwise noted, all statutory citations are to the Elections Code.

It is true that various provisions of the Code refer to insertion of a write-in's name in "the blank space left for that purpose." (§14238.) But section 14238 provides by its terms only that the write-in *may be* inserted in the blank space provided. No other statute requires that it be placed there or the ballot is void; on the contrary, it is clear that the blank space so provided is for the purpose of "*facilitating* write-in votes." (§10031.)

Yet as construed by the Court, the statutory scheme to encourage and facilitate write-in votes becomes instead a trap, a path to disenfranchisement, particularly where, as here, the ballot is itself unduly complicated and many of the electorate are inexperienced in the election process and some are illiterate. Indeed, even an experienced and literate voter is not expected to be intimate with the provisions of the Elections Code and is unlikely to know that a write-in vote other than in the blank space would be void. Why should Spanish-speaking electors, with none or only limited experience with voting, and with perhaps no facility for reading even in Spanish, be expected to possess such knowledge, on pain of having their newly-won franchise invalidated?

The opinion's only suggested basis for this harsh result is that "if the elector was not bound by the provisions of section 14238, write-in votes might be cast in as many different ways as there were write-in voters." (Opinion, p. 6.)[2] We respectfully submit, however, that the Court overstates the problem. Since the write-in vote must be on the official ballot, the variety of possible write-in votes is severely limited and is not unmanageable. Surely, efficiency

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[2]The opinion states that this would abrogate a "general scheme" regarding write-in votes. However, there is no such general scheme regarding municipal elections. A charter city is free to establish its own voting system for municipal elections. (§22601.)

and ease of counting must yield to more fundamental considerations, particularly where, as here, the votes have already been counted. Moreover, the Court's statement presupposes a willful capriciousness on the part of voters who *know* where write-ins are expected to be made. Surely it cannot rationally be supposed that the persons who voted for Mr. Hernandez by writing his name on the ballot card did so out of anything but ignorance that they were expected to write his name on the envelope — which did not look like a ballot and was not identified as a ballot on the outside flap of the envelope.[3] Whether these persons were confused by the overcomplicated two-part ballot, misled by the envelope's reference to the punchcard as the "ballot card" and to itself as an "envelope," or because they could not read and simply wrote their votes on the only thing that appeared to be a ballot, all votes were in fact cast on the official ballot. The fact these votes might have gone unnoticed under other circumstances cannot obscure the fact they have been noticed; the intent of these voters and of the plurality of voters is clear.

No one is contending for unfettered variety in the manner of write-in votes. But strict uniformity is purchased in this instance at too high a price. Uniformity will come through voter education and experience, not by discouraging people from even making the effort to vote. The slight lack of uniformity in this case is nothing compared to the importance of preserving the right to vote, of seeing that "the real

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[3]While one side of the envelope's exterior carries a pictorial representation of the write-in ballot inside, "write-in ballot" is difficult to read in the picture even in English. Since there is no Spanish-language depiction, even a literate Spanish-speaking voter would have no clue of the hidden significance of the self-described envelope.

will of the electors will not be defeated by any informality or failure to comply with all of the provisions of the law." (§15020.)

II.

ELECTIONS CODE SECTIONS 14238 AND 14241 AND 17007, TO THE EXTENT THEY REQUIRE THE RESULT REACHED BY THE COURT, ARE INVIDIOUSLY DISCRIMINATORY, ARBITRARY AND IRRATIONAL AND THEREFORE DENY DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 7 OF THE CALIFORNIA CONSTITUTION.

"*All* procedures used by a state as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote." (*Moore v. Ogilvie* (1969) 394 U.S. 814, 818, emphasis added; *Gould v. Grubb* (1975) 14 Cal.3d 661, 669.) Since the right to vote is fundamental a state-established procedure imposing a real and appreciable impact on this right must pass strict scrutiny and can only be justified by a compelling state interest. (*Id.* at 670.) Even less intrusive regulations must undergo a "serious and genuine judicial inquiry into the correspondence between the [statutory] classification and the legislative goals." (See *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 711.) Under either standard, the Court's opinion and the statutes on which it relies (to the extent they compel its result) deny to Mr. Hernandez and the voters disenfranchised by the Court due process and equal protection of the laws. We discuss first the four ballot card votes, and second the vote of Angela Alvarado.

1. The Four Ballot Card Votes.

What interest does the State of California have in invalidating four votes cast by writing in the name of Ralph Hernandez on the ballot card but not on the accompanying

envelope? It is difficult to imagine *any* interest, let alone a compelling interest and, as section 14238 (as construed by the Court) nullifies the right to vote of these persons, a compelling interest is plainly required. The Court's opinion suggests that if it were otherwise the Legislature's "general scheme regarding write-in votes" would be abrogated. But as noted above (footnote 2), the Legislature has no such general scheme regarding municipal elections. The City of San Bernardino and any other charter city is free to employ such other procedures as are consistent with the Constitution. (§22601.) And, in any event, the question remains: What compelling interest is served by the supposed general scheme?

Similarly, to suggest that if the four votes in this case were permitted by section 14238, "write-in votes might be cast in as many different ways as there were write-in voters" is incorrect and, we submit, begs the question. First, the only variety in question involves a write-in on one portion of the ballot rather than another. Moreover, as previously observed, it is to be expected that those persons who are familiar with voting instructions to write in the blank space will do so (if they can find it). And, in any event, the question still remains: What state interest in such strict uniformity offsets the right of eager but perhaps inexperienced or illiterate voters in having their write-in votes counted wherever they are written on the ballot so long as their intent is perfectly clear?[4]

The opinion suggests an interest in secrecy, uniformity, fairness and the integrity of the voting process, but gives no hint how these interests are threatened by counting the

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[4]Indeed, even from the Court's opinion it is clear that strict uniformity is not required. The trial court approved, and this Court affirmed, as to a number of write-ins not in the ballot's special "blank space" (e.g., Exhibits 76C, 76E).

votes in this case. The ballots in this case are as secret as any write-in; and, anyway, the secrecy of the ballot is for the protection of the *voters* (see *Patterson v. Hanley* (1902) 136 Cal. 265, 269), it cannot reasonably be advanced as a ground for frustrating the exercise of the very right it is supposed to protect. Further, it is impossible to see how validation of the slightly variant write-in votes in this case could threaten the fairness of the vote or the integrity of the voting process. Rather the opposite is true — it is both fairer and most consistent with the object of voting regulations that these votes be counted.

What seems to be implicit in the Court's opinion is the notion that to count write-ins written on a ballot card rather than the write-in ballot concealed in the ballot envelope would be administratively inconvenient. This might be true in some cases; it does not appear to have been true in this case. Nor, in this case, could this position reasonably be advanced when the ballot itself was "particularly complicated . . . for such a simple election," involving "a separate write-in ballot cleverly designed and, it could be argued, disguised as an envelope" (R.T. 546) for use by an inexperienced Spanish-speaking electorate. And, in any case, administrative convenience cannot defeat the exercise of a basic right. (See, *e.g., Dunn v. Blumstein* (1972) 405 U.S. 330, 349-352; *Reed v. Reed* (1971) 404 U.S. 71, 76-77; *Gould v. Grubb, supra,* 14 Cal.3d 661, 675.)

Thus, even without pursuing the implications of the use of an unnecessarily complicated ballot in this case, to construe and apply section 14238 to invalidate the four ballots here makes the statute unconstitutional. Accordingly, these votes should be credited as cast.

2. Vote of Angela Alvarado.

Angela Alvarado's vote was invalidated because, following the instructions of the Registrar's Office, she initialed a mistake on her absentee ballot, thus intentionally rendering the ballot identifiable. According to the Court's opinion this renders the vote invalid under sections 14241 and 17007.

We submit that these statutes are patently unconstitutional, whether measured by a strict scrutiny or rational relationship test. This is so for two reasons.

First, the statutes do not rationally further their evident purpose "to prevent the intimidation or corruption of electors" by denying the person coercing or bribing the voter the means of assuring he has succeeded, *i.e.*, the ability to identify the ballot. *Patterson v. Hanley, supra,* 136 Cal. 265, 269.) The Supreme Court long ago recognized both that a variety of perfectly legal marks will make a ballot identifiable, and that "the marks which have the effect of invalidating ballots are in most instances the result of ignorance and mistake, and not of any plan for the corruption or intimidation of voters." (*Patterson v. Hanley, supra,* 136 Cal. 265, 269-270; *Jennings v. Brown* (1896) 114 Cal. 307, 310.) The statutes are therefore not merely over- and under-inclusive, rather they strike entirely at the wrong persons while doing nothing to further their avowed purpose. No laws so admittedly irrational can fairly serve to disenfranchise Angela Alvarado.

Another way of reaching the same conclusion is to consider these statutes in terms of the developing law of unconstitutionally irrebuttable presumptions. The statutes automatically invalidating intentionally identifiable ballots effectively create an irrebuttable presumption that such a ballot reflects some type of corruption of the voting process, *i.e.*, that an act which intentionally makes the ballot iden-

tifiable does so only to further some improper purpose, presumably to provide proof of submission to intimidation or bribery. As in the case of Angela Alvarado, however, it is plain that such a presumption is not correct. Indeed, decades ago the Supreme Court acknowledged the conviction that it was most often mistake or ignorance which made ballots identifiable. (*Patterson v. Hanley, supra,* 136 Cal. 265, 269-270; *Jennings v. Brown, supra,* 114 Cal. 307, 310.)

Under the doctrine of irrebutable presumptions "where [as here] the private interests affected are very important, and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure" the Constitution "requires the government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices." (*U.S. Dept. of Agriclture v. Murry* (1973) 413 U.S. 508, 518, Marshall, J., concurring; *see, e.g., Cleveland Board of Education v. La Fleur* (1974) 414 U.S. 632; *Vlandis v. Kline* (1973) 412 U.S. 441; *Stanley v. Illinois* (1972) 405 U.S. 645.) Since, as the trial court found, Angela Alvarado's ballot was intentionally made identifiable not for corrupt reasons but because of good faith reliance on the advice of the Registrar, the statutory presumption of invalidity, when reduced as it must be to rebuttable status, was rebutted. Here, again, the only constitutionally permissible result is that Angela Alvarado's vote be credited as cast.

In sum, the Court's opinion neglects to consider the fundamental nature of the right to vote and the restraints placed on governmental interference with this right. It focuses, on "the blank space" when it should consider the purpose of any ballot. It looks at the four ballots in terms of nonconformity when it should consider why the ballots would be

nonconforming. It acknowledges the clear intent of the voters but reaches a strained result which frustrates that intent.

The relevant statutes can and should be construed to avoid constitutional objection. If they are not, they fail to survive constitutional scrutiny. It is therefore fully appropriate, indeed necessary, that the Court grant rehearing and, having done so, validate on constitutional grounds the five votes which, with all the others cast for Mr. Hernandez, truly express the will of the voters.

Conclusion.

Many Americans are, unfortunately, apathetic about the exercise of their right to vote; many, perhaps, are skeptical about the significance of their votes. But before the Court's opinion in this case, the voters who carried Ralph Hernandez to a dramatic write-in victory were given lasting proof that each of their votes counted. For everyone, but especially for the newly-enfranchised Spanish-American voter, this was a civics lesson of inestimable value, eloquent testimony to the democratic ideal. It should not be tossed aside. A contrary lesson taught now may never be unlearned.

Attention to the fundamental nature of the right to vote, to the basic purpose of statutory voting procedures, and to the controlling statutes themselves, precludes the statutory construction of the opinion. But if these considerations are dismissed for purposes of statutory construction, they cannot be for purpose of constitutional analysis. Due process and equal protection guarantees of our state and federal constitutions necessitate the same result that could and should have been reached through statutory construction—the write-in votes cast for Ralph Hernandez should be tallied for Ralph Hernandez.

We respectfully submit that for the foregoing reasons a rehearing should be granted and the rights and will of the

voters be confirmed along with the judgment of the trial court.

Respectfully submitted,

Florentino Garza of,
Garza, Kassell & Jordan,
and
Edward F. Taylor,
Attorneys for Defendant-Appellant
RALPH HERNANDEZ

Opposition

Office - Supreme Court, U.S.
FILED
SEP 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-344
IN THE

Supreme Court of the United States

October Term, 1981.

IN THE MATTER OF THE CONTESTED ELECTION
OF RALPH HERNANDEZ FOR THE
OFFICE OF COMMON COUNCIL
FOR THE CITY OF SAN BERNARDINO.

RALPH HERNANDEZ,

Petitioner,

vs.

LUTHER T. FAIR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPPEAL, DISTRICT FOUR, DIVISION TWO.

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No. 81-344

IN THE

Supreme Court of the United States

October Term, 1981.

IN THE MATTER OF THE CONTESTED ELECTION
OF RALPH HERNANDEZ FOR THE
OFFICE OF COMMON COUNCIL
FOR THE CITY OF SAN BERNARDINO.

RALPH HERNANDEZ,

Petitioner,

vs.

LUTHER T. FAIR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, DISTRICT FOUR, DIVISION TWO.

Introduction.

Justice delayed is justice denied. The proof of this adage may be found in the present action. The election for councilman of the Third Ward of the City of San Bernardino took place in May, 1979. Since that time, for nearly two and one-half years of a four-year term, the Petitioner, Ralph Hernandez, has exercised the office of councilman for the Third Ward of the City of San Bernardino. The Court of Appeal, in its decision of March 13, 1981, reversed the trial

court's award of the office to Hernandez. The California Supreme Court denied a petition for hearing in this matter on May 20, 1981. Respondent, Luther T. Fair, is now the leader in votes received for the office of councilman of the Third Ward of the City of San Bernardino. Despite this fact, Ralph Hernandez continues to fill the council seat because the matter has been remanded to the trial court to allow him to present defenses to Mr. Fair's action. Under any circumstances, a hearing by this court at this time should not be considered, since it is possible that the trial court will uphold the defenses raised by Mr. Hernandez, thereby rendering the requested hearing moot.

On the other hand, if this court grants a hearing at this time, the grant itself is tantamount to reversing the Appellate Court decision. Even if this court ultimately rules in Mr. Fair's favor, Mr. Fair will have been deprived of the council seat to which he was elected for most, if not all, of the elected term.

Mr. Hernandez is clearly content to delay the determination of this case for as long as possible. He filed a Petition for Rehearing in the Court of Appeal on the last possible date to do so. When that Petition for Rehearing was denied, Petitioner filed a Petition for Hearing in the Supreme Court on the last date available for him to do so.

It is unfortunate, as indicated by Justice Kaufman, in his concurring opinion to the opinion of the Court of Appeal, that the uncertainty of the resolution of the election has been prolonged. At this time, it is vital that this matter be allowed to proceed in this trial court, to allow Mr. Hernandez to raise his defenses in that forum, and to determine who is entitled to fill the remainder of the term of councilman of the Third Ward of the City of San Bernardino.

Response to Petitioner's Statement of Case.

Petitioner, at pages 3 through 6 of his Petition for Writ of Certiorari, sets forth his summary of the case. Because of misleading statements concerning the evidence presented at trial, Respondent is compelled to respond to third summary.

Petitioner seeks to case himself as the universal choice of the Spanish-American citizens of the Third Ward of the City of San Bernardino. No evidence was presented at trial either to the fact that the Third Ward of the City of San Bernardino is "largely Spanish-American" (see Respondent's Summary of the Case, No. 1, p. 3), or that Petitioner received the support of Spanish-American citizens of the Third Ward.

Petitioner states in his Summary of the Case (see No. 2, found at pp. 3 and 4), that the separate write-in ballot was "cleverly designed and, it could be argued disguised as an envelope." The Court of Appeal, in examining the punchcard ballot and the write-in envelope, found at page 3 of its decision:

> "Although characterized by the trial court as 'particularly complicated . . . for such a simple election' the write-in ballot used conformed with the requirements of the California Elections Code Section 10331. In addition to the legend, 'After voting insert ballot card with stub exposed into envelope pocket *and close flap*,' on each [ballot] a picture of the envelope *with the flap open* was graphically depicted. With the flap open the write-in ballot with instructions in English and Spanish, was unavoidable."
>
> [Emphasis by the court; footnote omitted.]

Paragraph 3 of the Summary states "many citizens of the Third Ward do not read or write in Spanish or English, but they voted in this election for the first time despite the

complexity of the ballot. (R.T. 251-252, 297-298, 407, 411, 416, 51.)"

The citations do not support the assertions. A review of the references from the reporter's transcript show only that neither the Registrar of Voters, William Clinton, nor his mother, could read Spanish. There is no evidence in the record that either of these persons were residents of the Third Ward of the County of San Bernardino. That is the extent of the evidence on languages and literacy in the Third Ward.

Response to Asserted Grounds for Hearing.

Ralph Hernandez argues that the court should grant a hearing on this case based on the grounds that the Third Ward of the City of San Bernardino is largely Spanish-American; that many citizens of the Third Ward do not read English or Spanish, and voted for the first time in this election; and that the provisions of the Elections Code, as applied by the Court of Appeal, improperly discriminates in favor of the better educated, English speaking voters. Although the Petition for Hearing goes on for some length on this theme, the argument must fail for the fundamental reason that, as a factual matter, these issues are not, nor have they ever been, involved in this case. No evidence was introduced at trial which would show that there are any voters of the Third Ward who cannot read or write English or Spanish, let alone that any such persons supported Ralph Hernandez for City Council.

The right to vote is indeed at the center of our democracy. Moreover it is the right to vote in privacy, free from political, social, or economic pressure to exercise the franchise to suit one's neighbors, employers, or relatives. No one denies the need to make the franchise freely available to adult citizens of this country, without arbitrary or invidious

barriers. The provisions for bilingual ballots, liberalized absent voter rules, and polling places accessible to the physically handicapped are all evidence of our government's continuing effort to make democratic elections a reality. The fact is that there are no arbitrary or invidious barriers here.

You are urged to abandon rules designed to insure privacy for voters. It would be naive in the extreme to believe that any comparative freedom from "vote buying" that California may enjoy results from our inherent virtue and not from determined efforts to make such intimidation and corruption impractical. The occasional voiding of an individual, improperly marked ballot is a necessary price to pay for the integrity of the voting process as a whole. The statutes are reasonably stated and upheld. Furthermore, unpredictability in their interpretation will encourage the substitution of court determination for electoral decision making.

Perhaps most serious of all, you are urged to do serious damage to the integrity of the judicial system by permitting a party to delay a final judicial determination, in a case where time is of the essence, by making factual assertions on appeal without any competent evidence underlying them.

When the unsupported factual arguments of Ralph Hernandez are discarded, this case becomes one which involves well settled principles of law. The Court of Appeal has held that four ballots must be invalidated where a write-in candidate's name was written on the punchcard instead of on the space provided on the write-in ballot. As determined by the Court of Appeal, the ballots used complied with the applicable provisions of the Elections Code, and contained clear instructions in both English and Spanish on how the ballots were to be marked.

In *McFarland v. Spengler* (1926) 199 Cal. 147, 152, this court held, under facts and statutes which are relevant details the same as those in this case, that improperly marked write-in ballots could not be counted, and stated that the right to express one's choice of candidates is not unrestricted, but is subject to reasonable regulations in the interest of secrecy, uniformity of the ballots, and the fairness of the vote. Improperly marked ballots were similarly rejected in *Salcedo v. Roberts* (1902) 136 Cal. 670, and *Livingston v. Heydon* (1972) 27 Cal.App.3d 672.

Additionally, the Court of Appeal invalidated one ballot where the voter has signed her name on the ballot and then crossed it out.

The Petitioner professes great concern that fundamental voting rights are being denied to this voter who made her ballot identifiable. He argues that the California statutes which bars such identifiable ballots serves no rational purpose. Yet this same issue was decided by the trial court and Petitioner made no attempt to challenge the ruling before the Appellate court. The trial court in Findings of Fact number 75 (Appendix D to Petition for Writ of Certiorari, p. 32) ruled that a certain ballot cast for the Petitioner would be disallowed because it was identifiable. Petitioner voiced no great concern for the fundamental rights of this voter. It is respectfully submitted that the only reason Petitioner now raises this issue is to attempt to delay the trial in this matter which he believes will result in the Respondent's taking office. It should also be observed that changing this vote would not effect the outcome of the election, since Luther Fair is ahead by three votes as determined by the Court of Appeal.

Conclusion.

Respondent, Luther T. Fair, has already been deprived of the opportunity to take the seat as councilman of the Third Ward of the City of San Bernardino for approximately two years of the four-year term. The Court of Appeal has placed Luther Fair in the lead in the vote count for that seat, and has remanded the case to the trial court to enable Petitioner, Ralph Hernandez, to assert defenses which he raised but has not had an opportunity to present. The California Supreme Court denied Hernandez' petition for hearing, which raised the identical issues that are raised in his petition for Writ of Certiorari before this court. In seeking a Writ of Certiorari before this court, Ralph Hernandez asserts that the decision of the Court of Appeal has improperly disenfranchised the illiterate, spanish-speaking supporters of Mr. Hernandez. This is done by Mr. Hernandez with full knowledge that there was no evidence submitted at trial supporting these assertions.

Mr. Hernandez is aware that he will continue to occupy the council seat pending any proceedings before this court. For this reason, Mr. Hernandez knows that he will have been successful if a hearing is granted, regardless of the ultimate determination of the case.

It is respectfully submitted that Ralph Hernandez has not raised any issue of law which are involved under the facts of this case. On the other hand, the granting of a hearing itself will work substantial prejudice not only to Respondent, Luther Fair, but also to the voters of the Third Ward of the

City of San Bernardino, who deserve to have the candidate who received the greatest number of votes serve as their councilman. It is therefore respectfully submitted that the Petition for Hearing must be denied.

Dated: September 17, 1981.

Respectfully submitted,

GARY C. WUNDERLIN,

ALLARD, SHELTON & O'CONNOR,

Attorneys for Respondent,

Luther T. Fair.